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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BARTELL RANCH LLC, *et al.*,  
Plaintiffs,

v.

ESTER M. MCCULLOUGH, *et al.*,  
Defendants.

WESTERN WATERSHEDS  
PROJECT, *et al.*,  
Plaintiffs,

v.

UNITED STATES DEPARTMENT  
OF THE INTERIOR, *et al.*,  
Defendants.

Case No. 3:21-cv-80-MMD-CLB  
Related Case No. 3:21-cv-103-MMD-  
CLB  
(Consolidated)

**FEDERAL DEFENDANTS'  
RESPONSE TO RENO SPARKS  
INDIAN COLONY AND THE  
BURNS PAIUTE TRIBE'S  
MOTION TO EXTEND TIME**

1 Plaintiff Intervenor, the Burns Paiute Tribe and Reno-Sparks Indian Colony  
2 moved on February 25, 2022, requesting 60 days to review the new record and an  
3 additional 30 days for filing opening motions for summary judgment in this action.<sup>1</sup>  
4  
5 See ECF No. 183. Plaintiffs, Bartell Ranch and Western Watersheds Project et. al.,  
6 filed a similar motions on February 28, 2022 requesting 30 days to review the new  
7 record and file motions on the administrative record and 30 days after resolution of  
8 those motions to prepare briefs on summary judgment. ECF Nos. 186, 188. Federal  
9 Defendants oppose these motions on the basis that a shorter schedule can  
10 accommodate Plaintiffs and Plaintiffs Intervenor concerns and avoid prejudice to  
11 Federal Defendants from Plaintiffs and Plaintiffs Intervenor disproportionate  
12 amount of time to file their motions for summary judgment. Moreover, judicial  
13 review of this agency action must be limited to “the administrative record already in  
14 existence, not some new record made initially in the reviewing court.” *Fla. Power &*  
15 *Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (citation omitted).

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19 Federal Defendants are open to a reasonable extension of time to review the  
20 additional documents prior to resolution of the existing claims in this case.  
21 Accordingly, taking account of the several pending motions before this Court and  
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24 <sup>1</sup> It is unclear whether the Court may entertain Plaintiffs-Intervenor dispositive  
25 motions in light of their pending appeal and the fact that “the filing of a notice of  
26 interlocutory appeal divests the district court of jurisdiction over the particular issues  
27 involved in that appeal.” *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254  
28 F.3d 882, 885–86 (9th Cir. 2001). To the extent Plaintiff-Intervenor wish to bifurcate  
their schedule, they should provide a proposed schedule for the Parties and Court’s  
consideration.

1 based on the existing parameters of the joint scheduling order, Federal Defendants  
 2 propose the following schedule<sup>2</sup>:

- 3 1. On **April 1, 2022**, Plaintiffs and Plaintiffs Intervenor shall file their opening  
 4 motions for summary judgment and brief in support of their motion for  
 5 summary judgment, limited to 40 pages for Plaintiff Bartell Ranch, et al., 40  
 6 pages for Plaintiff WWP, et al., 25 pages for Plaintiff Intervenor Reno Sparks  
 7 Indian Colony and 25 pages for Plaintiff Intervenor the Burns Paiute Tribe;  
 8
- 9 2. Federal Defendants and Lithium Nevada shall file their separate cross-motions  
 10 for summary judgment (combined with their opposition to Plaintiffs' and  
 11 Plaintiff Intervenor's motions), limited to 40 pages in response to Plaintiffs  
 12 Bartell Ranch, et al., 40 pages in response to Plaintiff WWP, et al., and 50  
 13 pages in response to Plaintiff Intervenor's, by no later than **45 days** after filing  
 14 of Plaintiffs' and Plaintiff Intervenor's opening briefs.  
 15
- 16 3. Plaintiffs and Plaintiff Intervenor shall file their combined opposition to  
 17 Federal Defendants' and Lithium Nevada's motions for summary judgment  
 18 and reply in support of their motions for summary judgment, limited to 40  
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 23 <sup>2</sup> Federal Defendants take the position that no further motions on the administrative  
 24 record are appropriate because the record is complete with all deliberative and non-  
 25 deliberative documents pertaining to the Thacker Pass Lithium Project and a privilege  
 26 log for any materials redacted or withheld was provided. Should the Court determine  
 27 time for further motions on the administrative record is necessary, Federal Defendants  
 28 request the Court set a deadline for any motions on the administrative record or  
 objections to the privilege log on **March 18, 2022**. If such a motion is filed, Federal  
 Defendants request the schedule for filing summary judgment motions be stayed **30  
 days until April 18, 2022** to accommodate time for briefing the motions.

pages each for Plaintiffs Bartell Ranch, et al., and Plaintiffs WWP, et al., and 25 pages each for Plaintiff Intervenor Reno Sparks Indian Colony and the Burns Paiute Tribe, by no later than **30 days** after filing of Federal Defendants and Defendant Intervenor;

4. Federal Defendants and Lithium Nevada shall file their separate replies in support of their motions for summary judgment, limited to 25 pages in reply to Plaintiffs Bartell Ranch, et al., 25 pages in reply to Plaintiff WWP, et al., and 40 pages in reply to Plaintiff Intervenor's motions, by no later than **30 days** after filing of Plaintiffs' and Plaintiff Intervenor's responses and replies.

#### **I. Background on Production of the Administrative Record**

BLM produced its initial record for the environmental claims in this matter on July 30, 2021. *See* ECF No. 122 at 1-2. After the Plaintiff Intervenor's intervention, BLM compiled additional documents for those new NHPA claims and produced a record to the parties on October 1, 2021. *Id.* The Parties were unable to resolve their disputes on the record and all parties filed motions for Federal Defendants to complete or supplement the record.

After parsing through four motions to complete or supplement the administrative record and twelve responses and replies, this Court ordered BLM complete the record "with any materials previously withheld as deliberative, or alternatively identify any documents still withheld as deliberative when Defendants supplement the AR in a privilege log." ECF No. 155 at 5-6. BLM duly undertook the task and lodged a revised Administrative Record ("revised AR") with the Court on

February 11, 2022. ECF No. 178. BLM also mailed copies of the revised AR to the parties that same day. BLM included all the materials related to its decision on the Thacker Pass Project in the revised AR, including several thousand non-substantive emails and documents previously excluded from the record on the basis that they were not directly or indirectly considered by the agency in making its decision and were thus deliberative. The Parties conferred on February 17, 2022 and Federal Defendants agreed to a three-week extension of the deadline for summary judgment briefing to accommodate review of the additional documents. The parties conferred again on February 23, 2022 and were unable to come to an agreement on a proposed schedule.

## **II. Further Motions on the Administrative Record are not Appropriate**

It is Federal Defendants position that the time for motions on the administrative record has passed. Plaintiffs and Plaintiff-Intervenors have had the opportunity to challenge the record and the record has since been revised with both deliberative internal agency materials and some of their requested documents. *See generally* ECF No. 178. Plaintiffs and Plaintiff-Intervenors request for another round of briefing on the revised AR runs counter to the principles of judicial review under the APA and risks miring this litigation in a perpetual state of motions on the sufficiency of the record rather than one focused on final resolution on the merits.

The scope of judicial review under the APA is limited to the administrative record. *See* 5 U.S.C. § 706 (“[T]he court shall review the whole record or those parts of it cited by a party[.]”). The “focal point” for such “judicial review should be the administrative record already in existence, not some new record made initially in the

1 reviewing court.” *Fla. Power & Light Co.*, 470 U.S. at 743 (citation omitted); *see also*  
2 *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436-37 (9th Cir. 1988), *amended*, 867  
3 F.2d 1244 (9th Cir. 1989) (same). Accordingly, Plaintiffs and Plaintiff-Intervenors  
4 should not be permitted to request the addition of their desired documents that are  
5 not currently in the administrative record. The revised AR consists of all documents  
6 related to the Thacker Pass Lithium Project held by the BLM. It has been certified by  
7 the agency as complete and that certification is entitled to a presumption of regularity.  
8 *Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Eng’rs*, 448 F. Supp. 2d 1, 5  
9 (D.D.C. 2006) (this presumption is derived from recognition that “[i]t is the agency  
10 that did the ‘considering,’ and . . . therefore is in a position to indicate initially which  
11 of the materials were ‘before’ it—namely, were ‘directly or indirectly considered.’”  
12 (citation omitted)). Plaintiffs and Plaintiff Intervenors have already had an  
13 opportunity to request the addition of their desired documents to the administrative  
14 record and they are not entitled to another opportunity based on the agency’s  
15 inclusion of thousands of documents not directly or indirectly considered by it in the  
16 revised AR.

17 BLM produced its initial administrative record consistent with District of  
18 Nevada holdings that deliberative documents, i.e. internal agency communications  
19 and materials, are not a part of the administrative record in the first instance for  
20 reasons unrelated to any assertion of privilege. *United States v. Carpenter*, No. 3:99-CV-  
21 00547-RLH, 2011 WL 4763675, at \*3 (D. Nev. Oct. 7, 2011). There has been no  
22 evidence of bad faith on the part of BLM. Yet, Plaintiffs and Plaintiff Intervenors lob  
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1 accusations that the production of many documents in accordance with this Court's  
 2 order "indicate[s] that Federal Defendants are likely still withholding documents that  
 3 should be part of the AR," ECF No. 186 at 4-5, or "appear[] to have been a[n] []  
 4 attempt by BLM to conceal records." *Id.* at 6; *see also* ECF No. 183 at 5 ("BLM's  
 5 attempts to withhold so much documentation suggests that there may be items in the  
 6 supplemented record that prove BLM's violations of the permitting process." ).<sup>3</sup> BLM  
 7 has not purposefully withheld documents that belong in the revised AR and any  
 8 accusations to the contrary should be abandoned.

### 11 III. CONCLUSION

12 Federal Defendants request this Court adopt the above-proposed schedule and  
 13 limit any further motions on the administrative record to allow for the timely  
 14 resolution of this case.

17 Respectfully submitted this 2nd day of March, 2022.

19 TODD KIM  
 20 Assistant Attorney General  
 21 United States Department of Justice  
 Environment and Natural Resources Div.

22 /s/ Leilani Doktor  
 23 LEILANI DOKTOR (HI Bar 11201)

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24 <sup>3</sup> Plaintiffs also contend that BLM "knew and willfully withheld records which should  
 25 have properly been in the [record] in the first instance," ECF No. 186 at 4-5, and that  
 26 BLM "never implied that it was withholding so many documents." ECF No. 188 at 4.  
 27 But the deliberative documents, now included in the revised AR, were excluded on  
 28 the basis that deliberative documents do not belong in the record in the first instance—  
 the documents inclusion now does not indicate any change to the substantive claims  
 of this case.

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